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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[redacted]3

No. [redacted]50

MORRIS GOTTHILF, PETITIONER,

vs.

BENJAMIN SILLS, ET AL.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1962
CERTIORARI GRANTED APRIL 1, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 673

MORRIS GOTTHILF, PETITIONER,

vs.

BENJAMIN SILLS, ET AL.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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[fol. 1]

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

BENJAMIN SILLS, MORTON SILLS and
SILLS OF CAMBRIDGE, INC., Plaintiffs-Respondents,

—against—

CHARGE-IT SYSTEMS, INC., Defendant,

—and—

MORRIS GOTTHILF, Defendant-Appellant.

EXCERPT FROM STATEMENT UNDER RULE 234

* * * * * * *

[fol. 3] On June 15, 1961 Archibald Palmer, Esq., filed notice of appeal to this Court on behalf of the defendants from the order of May 9, 1961 and the judgment of May 24, 1961. O. John Rogge, Esq., represented defendant-appellant on that appeal on the motion for an order before Mr. Justice Gellinoff for body execution, and represents him on this appeal. Theodore Charnas, Esq. represented and represents the plaintiffs-respondents.

[fol. 4]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC., Plaintiffs,

—against—

CHARGE-IT SYSTEMS, INC. and MORRIS GOTTHILF, Defendants

NOTICE OF APPEAL—April 19, 1962

Sirs:

Please Take Notice that the individual defendant, Morris Gotthilf, hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from an Order of Mr. Justice Abraham J. Gellinoff, entered at the office of the Clerk of the County of New York on March 26, 1960, allowing in all respects the motion of the plaintiffs for body execution against the appellant Morris Gotthilf, and from a memorandum opinion of Mr. Justice Gellinoff which appeared in the New York Law Journal February 15, 1962, page 12, column 7, in the instant case, as well as another memorandum of Mr. Justice Gellinoff which appeared in the New York Law Journal, March 14, 1962, page 12, column 5, also in the instant case, and from each and every part of the order and the two memoranda by Mr. Justice Gellinoff.

[fol. 5] Notice of the entry of the Order appealed from was served on counsel by mail and was received by counsel in the mail on the 5th day of April, 1962.

Dated: New York, New York, April 19, 1962.

O. John Rogge, Attorney for Morris Gotthilf, 44 Wall Street, New York 5, New York, DIgby 4-8444.

To:

Mr. James McGurrin, Clerk, Supreme Court, C[K]
of New York, Center & Pearl Streets, New Y[o]
New York;

Theodore Charnas, Attorney for Plaintiffs, 551 Fifth Avenue, New York 17, New York.

[fol. 6]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ORDER APPEALED FROM—March 23, 1962

* * * * * * *

Present: Hon. Abraham V. Gellinoff, Justice.

Plaintiffs having moved for an order directing the issuance of an execution against the person of the defendant Morris Gotthilf, and said motion having duly come on to be heard on the 31st day of January, 1962.

Now on reading and filing the notice of motion dated January 15, 1962; the affidavits of Benjamin Sills and Leonard R. Berson, Esq., both verified the 12th day of January, 1962; the affidavit of Hyman Jacobs, Esq., verified the 30th day of January, 1962; the supplemental affidavit of Theodore Charnas, Esq., verified the 23rd day of February, 1962, in support thereof; and the affidavits of Morris Gotthilf and Archibald Palmer, Esq., both verified the 25th day of January, 1962, the affidavit of Morris Gotthilf, verified the 1st day of February 1962, and the additional affidavit of Morris Gotthilf, verified the 21st day of February, 1962, in opposition thereto, and upon all the pleadings and [fol. 7] proceedings heretofore had herein, and the Court having made and filed its decision in writing, after due deliberation thereon,

Now, on motion of Theodore Charnas, attorney for plaintiff herein, it is

Ordered, that the said motion be, and the same hereby is, granted in all respects, and it is further

Ordered, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant.

Enter,

A. V. G., J.S.C.

[File endorsement omitted]

[fol. 8]

In Supreme Court of the State of New York

County of New York

Notice of Motion for Body Execution—January 15, 1962

Sirs:

Please Take Notice, that upon the annexed affidavit of Benjamin Sills and Leonard R. Berson, Esq., both verified the 12th day of January, 1962, and upon all the pleadings and proceedings heretofore had and filed herein, a motion will be made at a Special Term, Part I of this Court, to be held at the Courthouse #60 Centre Street, New York City, N. Y., on the 31st day of January, 1962 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing the issuance of an execution against the person of defendant, Morris Gotthilf, pursuant to Article 44 and Sec. 826 of the Civil Practice Act, and for such other and further relief as to the Court may seem just and proper.

Please Take Further Notice, that answering affidavits, if any, are required to be served on plaintiffs' attorney on or before January 26th, 1962.

Dated: New York, January 15, 1962.

[fol. 9] Yours, etc.

Theodore Charnas, Attorney for Plaintiffs.

To:

Morris Gotthilf, Defendant, 300 East 57th Street, New York, N. Y.;

Archibald Palmer, Esq., 320 Broadway, New York 7, N. Y.;

O. John Rogge, Esq., 44 Wall Street, New York 5, N. Y.

[fol. 10]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF BENJAMIN SILLS READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Benjamin Sills, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I make this affidavit in support of the within application for issuance of execution against the person of the individual defendant Morris Gotthilf.

On the 9th day of May, 1961 an order was duly made and entered by Hon. George M. Carney after an inquest at which defendants' attorney appeared and abruptly left, directing the entry of judgment in favor of plaintiffs against the defendants for damages for fraud and deceit in the sum of $17,408.77, together with interest, costs and disbursements.

On the 24th day of May, 1961, judgment was duly entered in the above entitled action in favor of plaintiffs against both defendants for the sum of $19,293.38, in the office of the Clerk of the County of New York.

On the 25th day of May, 1961 execution was issued upon said judgment against the property of each of the defendants out of the Supreme Court of New York County. At [fol. 11] the time of the issuance of said execution the corporate defendant had an office in the County of New York and the individual defendant resided in the County of New York, which county is the same county to which said executions were issued.

Both said executions were returned unsatisfied to the office of the Clerk of New York County by the Sheriff of New York County on June 19, 1961.

The judgment aforesaid remains wholly unpaid and unsatisfied and there remains due thereon the sum of $19,293.33 with interest from May 24, 1961.

The judgment rendered was in an action of the nature of one wherein, pursuant to Section 826 (5) of the Civil

Practice Act, a right to arrest is provided, having been an action for fraud and deceit. Defendants, who were engaged in collecting accounts receivable for plaintiffs, and who had collected large sums of money for plaintiffs, had falsely and fraudulently represented to plaintiffs verbally and in writing that defendants were remitting same to the Internal Revenue Service on behalf of plaintiffs. In reality, however, the Internal Revenue Service had never received such moneys from defendants and defendants deliberately and wrongfully misappropriated the same.

No application has been made for this or similar relief sought herein to this or any other court or judge.

Wherefore, your deponent respectfully requests that an order be made directing that an execution issue against the person of the said Morris Gotthilf, the individual defendant.

(Sworn to by Benjamin Sills on January 12, 1962.)

[fol. 12]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF LEONARD R. BERSON READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Leonard R. Berson, being duly sworn, deposes and says:

I am an attorney associated with the attorney for plaintiffs, and am fully familiar with all the proceedings heretofore had herein.

The judgment herein was entered on May 24, 1961, upon a single cause of action for fraud and deceit. The order directing entry of judgment was made by Hon. George M. Carney, after an inquest at which defendants appeared by their attorney, Archibald Palmer, Esq. Mr. Palmer left the proceedings before Mr. Justice Carney prior to the conclusion thereof.

On June 15, 1961, defendants appealed to the Appellate Division, First Department, from the judgment and the order directing entry of judgment. The Appellate Division

has since unanimously affirmed the order and judgment, with costs. On the appeal, defendants were represented by O. John Rogge, Esq.

[fol. 13] In view of the fact that defendant, Morris Gotthilf, has been represented by more than one attorney, during successive stages of the prior proceedings, notice of this application is being given to both Archibald Palmer, Esq., and O. John Rogge, Esq., as well as to defendant, Morris Gotthilf.

(Sworn to by Leonard R. Berson on January 12, 1962.)

[fol. 14]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF HYMAN JACOBS READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Hyman Jacobs being duly sworn, deposes and says:

I am an attorney-at-law and am associated with Theodore Charnas, the attorney for the plaintiffs herein. I have been duly authorized by the plaintiffs to make and submit this affidavit on their behalf.

I have been in charge of this litigation since its inception and am fully familiar with all the facts and matters referred to herein. I have in my possession the files of the plaintiffs and have discussed this matter fully with them.

The individual plaintiffs were the owners of all the stock of a firm known as Sills of Cambridge, Inc., which was in the business of manufacturing and selling men's haberdashery in the City of New York. The defendant, Charge-It Systems, Inc., was the factor of Sills of Cambridge, Inc. and Morris Gotthilf was the principal stockholder and officer of the factor.

On or about September 24, 1959 the plaintiffs desired to terminate their relationship with the factor and on that [fol. 15] day they acknowledged an obligation to the factor of $22,768.69 (for the purpose of the settlement), and

the factor acknowledged that it was holding $28,319.28 in accounts receivable.

The individual plaintiffs agreed at that time to pay to the factor $13,000. out of their personal assets, and the factor agreed, upon receipt of said sum in installment that it would discharge the plaintiffs from the balance of their obligation.

In addition to the foregoing the factor agreed to collect the accounts receivable and to turn over the proceeds to the Internal Revenue Service, which had a claim against the plaintiff corporation and the individual plaintiffs for delinquent taxes.

The $13,000. was paid in full by the individual plaintiffs on the due dates of the installments.

In the meantime, Gotthilf, the individual defendant, collected the accounts receivable and, instead of turning the proceeds over to the Internal Revenue Service as agreed, he pocketed them, and in order to allay any suspicion on the part of the plaintiffs sent them what purported to be carbon copies of pretended letters to the Internal Revenue Service enclosing payments. Needless to say, Gotthilf did not send any letters or payments to the Internal Revenue Service.

This action was started to recover damages for the fraud and deceit of the defendants.

After repeated wilful defaults on the part of the defendants, the answer of the defendants was stricken by Mr. Justice Markowitz, and the matter set down for inquest before Mr. Justice Carney.

[fol. 16] At the inquest, of which defendants received notice, their attorney appeared and although offered an opportunity to contest the plaintiffs' claim, refused to take part in the proceedings and left the court-room. After hearing the testimony of the plaintiffs and of Mr. Nathan Sprintzen, of the Internal Revenue Service, Mr. Justice Carney found for the plaintiffs in the sum of $17,408.77 damages, for defendants' fraud and deceit.

The defendants appealed to the Appellate Division, which unanimously affirmed the judgment entered in this Court.

All the arguments set forth in the moving affidavit before this Court were advanced before the Appellate Division orally and in the defendants' brief.

The plaintiffs respectfully request that the Court take judicial notice of the contents of the defendants' brief in the Appellate Division. A copy of said brief will be submitted to the Court to assist it for that purpose.

The so-called defenses of which the individual defendant claimed he was deprived are sham and specious. He now states that because of the alleged fraud of the plaintiffs in misrepresenting that if the defendants did not accept their offer they would have to go into bankruptcy, even if true, would be insufficient in law and in fact.

Defendant's own admissions in this case negative the existence of such a defense. The defendant admitted that he sent the copies of the purported letters to the plaintiffs. If the defendant claimed that he was entitled to the proceeds of the factored accounts, how could he explain the so-called letters pretending to transmit monies to the Internal Reve-
[fol. 17] nue Service? To claim that he is entitled to the monies and at the same time pretend that he had sent the money to the Internal Revenue Service clearly shows that this defense is an afterthought and has no substance whatsoever. The other defense is that his attorney acted upon a misunderstanding, which was that he thought he had an agreement with counsel for the plaintiffs, that the plaintiffs would proceed only against the corporate defendant, although he admitted advising the attorney for the plaintiffs [that it] was insolvent and out of business. Such an agreement, which in effect called for the plaintiffs' attorney selling his clients down the river, could not possibly have happened. Certainly, such an agreement, if entered into, would have been reduced to writing by counsel for the defendants, Mr. Archibald Palmer, who is known throughout the Metropolitan area for his experience in the Bankruptcy Courts. Mr. Palmer never had any such understanding or misunderstanding with the attorney for the plaintiffs.

Oddly enough, in all the subsequent proceedings in which the defendants wilfully defaulted, Mr. Palmer and his clients had notice that the plaintiffs were seeking relief against both defendants, and not only against the corporate defendant.

However, all these arguments were advanced by the defendant, Gotthilf, in the Appellate Division, and before

then, in his motion to vacate his defaults. The arguments were all struck down by the courts, and finally so by the Appellate Division.

Mr. Gotthilf stands convicted of being a common swindler. The attempts of his attorney to whitewash him failed be- [fol. 18] fore the Appellate Division and should fail in the instant proceeding. If defendant is successful in defeating this application for a body attachment, it would be difficult to visualize circumstances which could justify a body attachment.

It is therefore respectfully requested that plaintiffs' motion for a body attachment should be granted in all respects.

(Sworn to by Hyman Jacobs on January 30, 1962.)

[fol. 19]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF MORRIS GOTTHILF READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Morris Gotthilf being duly sworn on oath deposes and says that:

1. I am the individual defendant in this proceeding, and I make this affidavit in opposition to a motion for body execution against me under Article 44 and Section 826 of the Civil Practice Act.

2. I had a good defense in this proceeding, but I lost it through a default order; and the default order was the result of a misunderstanding between my then attorney Archibald Palmer (whose affidavit accompanies mine), and the attorneys for the plaintiffs.

3. The plaintiff corporation and the defendant corporation entered into a factoring agreement under which the defendant corporation as factor made large advances to the plaintiff corporation. This factoring agreement was entered into years before I become associated with the

[fol. 20] defendant corporation. On September 22, 1959 there was due under this factoring arrangement from the corporate plaintiff to the corporate defendant the sum of $22,768.39, for which the corporate defendant held as collateral, accounts receivable of $28,319.28. The figure of $28,319.28 included accounts of doubtful and disputed collectability amounting to some $23,000.00. The existence of this worthless collateral plus the threat that the plaintiffs would go into bankruptcy, induced the corporate defendant to settle the amount of $22,768.39 due it for $13,000.00, thereby sustaining a loss of some $9,500.00.

4. The default order in this case was entered on November 17, 1960. It was entered against me as well as the corporate defendant. However, my then attorney Archibald Palmer thought that he had an understanding with counsel for the plaintiff, that the default order and subsequent judgment would be entered against the corporate defendant only, and not against me. After all, everything that I did, I did in my representative capacity as chairman of the board of the corporate defendant.

5. When it was discovered that the plaintiffs were proceeding against me as well as the corporate defendant, a motion was made to vacate this default order, but this motion was denied by an order of March 10, 1961.

6. Final judgment was entered against both defendants on May 24, 1961, and my then attorney Archibald Palmer filed a notice of appeal; but he failed to include in the [fol. 21] notice of appeal the order of March 10, 1961 denying the motion to set aside the default order entered against me as well as the corporate defendant. The plaintiffs in their brief in the Appellate Division accordingly made the point that "the individual defendant, Gotthilf, having failed to appeal from the order denying his motion to vacate his default, the appeal taken herein is unauthorized and in violation of Section 557 of the Civil Practice Act." The Appellate Division affirmed without opinion.

7. I am sure that Archibald Palmer, Esq. did his best, but it was not good enough; and during the course of the appeal I retained O. John Rogge, Esq. in the place and

stead of Archibald Palmer, Esq. Mr. Rogge is doing a more expeditious job, but he is handicapped by the state of the record.

8. Actually in this case, the corporate plaintiff received the large sum of $22,768.39 which it never repaid. The corporate defendant, years before I went with it, advanced large sums of money to the corporate plaintiff and received as collateral security therefor an assignment of accounts receivable of the corporate plaintiff and the personal guaranty of the individual plaintiffs herein for said loans. On or about September 22, 1959, there was due to the corporate defendant from the corporate plaintiff the sum of $22,768.39 for which the individual plaintiffs were individually liable as guarantors.

9. Approximately two months before September 22, 1959, the individual plaintiffs represented to deponent that the [fol. 22] corporate plaintiff had ceased doing business and was insolvent, and that neither the corporate plaintiff nor the individual plaintiffs had any funds with which to pay the moneys due to the corporate defendant. They further represented to deponent that in view of the fact that a tax lien had been filed by the Director of Internal Revenue in excess of $10,000 against the corporate plaintiff, that all of the plaintiffs herein would be compelled to file voluntary petitions in bankruptcy unless deponent, on behalf of the corporate defendant, agreed to accept a lesser sum in payment of the indebtedness due to the corporate defendant.

10. After a period of negotiation between the plaintiffs and the defendants, the corporate defendant agreed to accept the sum of $13,000 in settlement of the indebtedness due from the plaintiffs, with the understanding that deponent was to negotiate an agreement with the Director of Internal Revenue on behalf of the plaintiffs herein with respect to the moneys due to the government for taxes from the plaintiffs. Deponent, as a certified public accountant, had agreed to attempt to adjust these matters with the Director of Internal Revenue without remuneration, in order to assist the plaintiffs in connection with their financial troubles.

11. Thereafter, deponent learned that the representations which had been made to him by the plaintiffs with respect to their financial condition were false and that the plaintiffs had sufficient assets with which to pay their debts in full and had no intention of filing voluntary peti- [fol. 23] tions in bankruptcy. In view of these false representations, neither deponent nor the corporate defendant were, therefore, bound by the terms of the executory accord entered into between the plaintiffs and the corporate defendant herein, and the corporate defendant was entitled to retain the moneys collected from the accounts receivable which had been assigned to it up to the sum of $22,768.39, the amount admitted to be due to the corporate defendant from the plaintiffs. (All told only an aggregate of $3,663.02 was collected by the corporate defendant from these accounts receivable.)

12. In addition to the foregoing it was understood that the agreement set forth in Exhibit A annexed to the plaintiffs' complaint was contingent upon the acceptance by the Internal Revenue Service of the terms and conditions of the letter dated September 22, 1959 submitted to the Director of Internal Revenue with respect to the manner of payment of the indebtedness of the corporate plaintiff. In view of the fact that the Director of Internal Revenue subsequently rejected said offer, the condition subsequent upon which this agreement was based failed to materialize, and the agreement thereupon became null and void, and the corporate defendant was therefore no longer obliged to turn over any moneys to the Internal Revenue Service on behalf of the corporate plaintiff.

13. Both defendants had a good and meritorious defense to this action, and they were entitled to judgment on their counterclaims for moneys due the corporate de- [fol. 24] fendant from the plaintiffs. In addition, I had a further defense in that everything that I did I did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, if there was any liability running to the plaintiffs, it was from the corporate defendant and not from me individually. See for example, *Potter* v. *Muskoff*, 4 N. Y. 695 (1958), affirming 2

A.D. 2d 513 (4th Dept. 1956); *Matter of Brookside (Raybrook Textile Corp.)*, 276 App. Div. 357 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20 (Sup. Ct. N. Y. Co. 1919), aff'd 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151 (Sup. Ct. Nassau Co. 1939).

14. Moreover, the collateral in the form of accounts receivable given to secure the loans from the corporate defendant to the corporate plaintiff became and were worthless prior to my association with the defendant corporation. I only arranged to salvage $13,000 out of $22,768.39. In addition, the corporate defendant collected from these accounts receivable further sums aggregating $3,663.02. The corporate defendant was thus still the loser to the extent of some $6,500.00.

15. Because my former attorney, Mr. Palmer, did not keep me advised as to what was going on in this case, I never had my day in Court. He did not tell me about such things as a date for an examination before trial or court dates. My former attorney did not bring me current on what had happened until the time of the motion to vacate the default order against me as well as the corporation. If I had had my day in court I could have explained the facts [fol. 25] as I have explained them in this affidavit. I could have shown that the corporate defendant still ended up the loser to the extent of some $6,500. I could have demonstrated the worthlessness of the accounts receivable that served as collateral for the advances from the corporate defendant to the corporate plaintiff. I could have shown that the amounts which were collected from this pretty worthless collateral after September 22, 1959 aggregated the grand and miserable total of but $3,663.02.

16. Despite the fact that the final judgment of this case is the result of a mistaken default order against me individually, I nevertheless stand ready to cooperate with the Court. Despite the fact that I feel that any liability running to the plaintiffs is from the corporate defendant, and not from me individually, nevertheless I have tried and will continue to try to raise enough money to satisfy the plaintiffs.

17. I am a certified public accountant and president of the Enrolled Accountants Association of the State of New York, as well as Chairman of the Board of Governors of the Accountants Association of New York. I have served from time to time in these two capacities for the past 15 years and more. I have practiced my profession in the State of New York for more than 40 years. My home is likewise in the city, county and state of New York. I have lived here since 1910, more than a half century. The last few years have been bad years for me financially, but I have had good years in the past, and I hope to have them again. When [fol. 26] I do, I will pay the plaintiffs enough money to satisfy them.

18. I am present and available for any supplementary proceedings which the attorneys for the plaintiffs may wish to conduct, and I will continue to be present and available. I have not engaged and will not engage in any evasive or dilatory conduct in contemplation of any supplementary proceedings. On the contrary, I will be there, and I will be both cooperative and communicative. Furthermore, I stand ready to post a bond in a reasonable amount to guarantee my presence and cooperation in any supplementary proceeding which the plaintiffs may wish to conduct.

19. In an affidavit filed by one of the counsel for the plaintiffs in the Appellate Division, First Department, there is a suggestion that I fled the United States in 1961 because of judgments against me. This is a base falsehood. I was in Israel on the official invitation of the Israeli government. Moreover, I was gone for less than two months, departing this country on March 28, 1961 and returning on May 20, 1961. Since that time I have been in this country and in the city, county and state of New York, working hard to solve my problems, and I intend to continue staying right here and doing just that.

Wherefore, I respectfully request that the instant motion for body execution against me under Article 44 and Section 826 of the Civil Practice Act be wholly denied.

(Sworn to by Morris Gotthilf on January 25, 1962.)

[fol. 27]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF ARCHIBALD PALMER READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Archibald Palmer, being duly sworn on oath deposes and says that:

1.- I was the attorney for the defendants herein until the time that the individual defendant Morris Gotthilf employed O. John Rogge, Esq. I am fully familiar with all of the facts and proceedings had in the trial Court in this matter and am submitting this affidavit in opposition to the motion of the plaintiffs for a body execution against the defendant Morris Gotthilf under Article 44 and Section 826 of the Civil Practice Act.

2. The affidavit of the defendant Morris Gotthilf, submitted in opposition to the instant motion for body execution indicates clearly that there was a good and meritorious defense to the instant action, and also that the individual defendant Morris Gotthilf could not have been held individually liable for the acts alleged in the complaint.

3. A perusal of the answer submitted by the defendants in the instant case will indicate clearly that a valid defense [fol. 28] was alleged and that in addition a valid counterclaim was asserted, and that this answer was interposed in good faith and not for the purpose of delay.

4. The facts and circumstances leading up to the obtaining of a default judgment against the individual defendant herein are as follows: Shortly after the service of the original answer herein, deponent communicated with the attorney for the plaintiffs and arranged an appointment with said attorney at his office between deponent, the individual defendant herein and Mr. Theodore Charnas. At said meeting deponent and Mr. Gotthilf discussed this

matter with Theodore Charnas, and the defendant Morris Gotthilf discussed the allegations of the complaint in order to prove to plaintiffs' attorney that he was not individually responsible to the plaintiffs and that there had been no improper conduct on the part of the defendants in connection with the transactions alleged in the complaint. At the conclusion of this meeting it was tentatively agreed that the corporate defendant would continue its efforts to collect the accounts receivable of the corporate plaintiff, which had been assigned to it, and would forward the proceeds to the Director of Internal Revenue. Plaintiffs' attorney had previously rejected Mr. Gotthilf's offer to turn over these accounts receivable to the plaintiffs for collection or to assign the balance of said accounts to the Director of Internal Revenue for the account of the plaintiffs.

5. After a motion had been made by the plaintiffs addressed to the original answer interposed by the defendants [fol. 29] herein, a verified amended answer was interposed on behalf of the defendants which denied the substantial allegations of the complaint and which set forth three affirmative defenses on behalf of the defendants and two counterclaims on behalf of the corporate defendant. No further motions were made with respect to the pleadings.

6. Prior to the scheduled time of the examination before trial of the defendants on October 27, 1960, deponent called the office of the attorney for the plaintiffs to obtain an adjournment of said examination due to his engagement in another matter at the scheduled time for the examination. Deponent was unable to reach plaintiffs' attorney at that time, and later in the morning deponent received a call from the office of plaintiffs' attorney and spoke to an individual whom he assumed to be Mr. Theodore Charnas. Deponent discussed the matter with said attorney and advised him that in view of the fact that the corporate defendant was insolvent and that it had been shown to said attorney that the individual defendant was not personally responsible, deponent would be willing to have judgment entered against the corporate defendant alone, and would thereupon abandon the counterclaims interposed in the verified amended answer. It was deponent's understanding that said attorney

agreed to this proposal and that the matter was to be disposed of in this manner.

7. Deponent thereafter proceeded upon the assumption that the motions made by the attorney for the plaintiffs [fol. 30] were based upon this agreement and that said attorney was merely proceeding to enter judgment against the corporate defendant. It was not until deponent was served with a copy of the order signed by the Hon. Aaron Steuer granting judgment herein and setting down the matter of inquest on February 9, 1961, together with a notice of inquest which indicated that the plaintiffs were seeking execution against the person of the individual defendant herein, that deponent realized that plaintiffs' attorney had proceeded against the individual defendant as well as the corporation, contrary to his understanding with said attorney.

8. Upon receiving these documents, deponent communicated with the attorney for the plaintiffs and inquired why said attorney had disregarded the agreement upon which deponent had permitted plaintiff's attorney to note a default in connection with the examination before trial originally scheduled for October 27, 1960. Deponent advised Mr. Theodore Charnas that in view of the fact that there were bona fide issues of fact involved in this action he could not possibly have consented to judgment against the individual defendant. Mr. Theodore Charnas replied that he had not personally handled the entry of the judgment herein and the proceedings subsequent thereto, and therefore was unable to answer deponent's inquiry. When deponent requested that Mr. Charnas vacate the judgment against the individual defendant, he was advised to make a motion for such relief.

9. It appears from the order of the Honorable Jacob Markowitz dated November 16, 1960 that the plaintiffs' mo- [fol. 31] tion to strike the amended answer and counterclaims of defendants was granted upon the representation of the counsel for plaintiffs that the defendants' counsel informed him that defendants had abandoned this case. As hereinabove shown, this representation was, at the very

least, based upon a misunderstanding on the part of plaintiffs' counsel with respect to the statements made to him by deponent on October 27, 1960, and it was never deponent's intention to abandon the defense of the action against the individual defendant herein. It is apparent that since deponent had prepared a verified answer in this proceeding which raised bona fide issues of fact, he could never have consented to the entry of a default judgment against the individual defendant. In this connection, I call to the Court's attention, as I have indicated at the outset in this affidavit, that the defendant Morris Gotthilf was not individually liable for the acts alleged in the complaint. Everything that Morris Gotthilf did he did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, any liability running to the plaintiffs was from the corporate defendant and not from the individual defendant Morris Gotthilf. See for example, *Potter* v. *Minskoff*, 4 N. Y. 695 (1958), affirming 2 A.D. 2d 513 (4th Dept. 1956); *Matter of Brookside* (*Raybrook Textile Corp.*), 276 App. Div. 357 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20 (Sup. Ct. N. Y. Co. 1919), aff'd 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151 (Sup. Ct. Nassau Co. 1939).

[fol. 32] Wherefore, I pray that the instant motion for a body execution against the defendant Morris Gotthilf under Article 44 and Section 826 of the Civil Practice Act be denied in its entirety.

(Sworn to by Archibald Palmer on January 25, 1962.)

[fol. 33]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

REPLY AFFIDAVIT OF MORRIS GOTTHILF READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Morris Gotthilf being duly sworn on oath deposes and says that:

1. I am the individual defendant in this proceeding and I make this affidavit in opposition to the affidavit of Hyman Jacobs.

2. This lawyer says that I stand convicted of being a common swindler. This charge is both base as well as baseless, and is of a piece with the false charge which this same lawyer made that I fled the United States in 1961 because of judgments against me, when in truth and in fact I was in Israel on the official invitation of the Israeli government, and was gone all told for less than two months, from March 21, 1961 to May 20, 1961.

3. This lawyer makes the further false charge that I pocketed money collected from the accounts receivable. I never pocketed any of these moneys. I never profited personally, and the corporate defendant is still the loser in its [fol. 34] dealings with the corporate plaintiff to the extent of some $6,500.00. In the period to which this lawyer refers in his affidavit, I did not even draw a salary from the corporate defendant.

4. This lawyer also says that I was the principal stockholder of the corporate defendant. The truth of the matter is that I was never a stockholder of the corporate defendant. The truth of the matter is that I engaged in a salvaging operation for the corporate defendant, but the corporate defendant had already made too many advances on poor collateral, such as those to the corporate plaintiff, for my attempt at a salvage operation to be successful.

(Sworn to by Morris Gotthilf on February 1, 1962.)

[fol. 35]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ADDITIONAL AFFIDAVIT OF MORRIS GOTTHILF READ IN OPPOSITION TO MOTION

State of New York
County of New York, ss.:

Morris Gotthilf, being duly sworn on oath deposes and says that:

1. I am the individual defendant in this proceeding and I make this affidavit in response to the opportunity granted me to do so by Mr. Justice Gellinoff in his opinion in this matter, reported in The New York Law Journal, February 15, 1962.

2. I have no assets and the only income that I receive is from my business.

3. The net income (before taxes) which I received from my business for the past three years and in the current year to date is as follows:

1962 to date		$ 3,177.54
1961	Loss	(4,523.72)
1960		11,543.30
1959		19,253.18

[fol. 36] 4. As explained in my affidavit of January 25, 1962 in this matter, the last few years have been bad years for me financially, but I have had good years in the past, and I hope to have them again. I am a certified public accountant and president of the Enrolled Accountants Association of the State of New York, as well as Chairman of the Board of Governors of the Accountants Association of New York. I have served from time to time in these two capacities for the past 15 years and more. I have practiced my profession in the State of New York for more than 40 years.

5. Sometimes in the past I have had a successful refinancing which has brought me substantial income. I have some such transactions that I am working on now, but, like a lawyer with a case, I am not sure that they will be successful.

6. Concretely what I propose as a minimum is this: beginning March 1962 I will undertake to pay to the plaintiffs 25% of my net income, payable monthly on the 5th day of the following month, that is, the first payment to begin on April 5, 1962 and to continue monthly thereafter.

7. In conclusion I respectfully pray that the Court permit me to continue to try to earn all that I possibly can, for this will enable me to make payments against the judgment. I have no other means whatever of obtaining funds. If I should be incarcerated I will have to stay there, for I will then be through professionally and in the finance field where I now make most of my present limited income.

[fol. 37] 8. My heart prompts me to add two further thoughts, and they both stem from the fear that I have not appealed to Your Honor's discretion despite the fact that I have offered to do a little more than I think I can. The first thought is that if my offer of 25% of my net income is not high enough in the Court's opinion then I will try to comply with what the Court suggests it ought to be if the Court will make such a suggestion. The second thought is this: if the Court does grant the motion for the issuance of a body execution then my life is through, finished, professionally and in every other way; and in addition to this intolerable condition, I shall also have the problem of trying to persuade my attorney O. John Rogge to appeal to the Appellate Division, First Department for such an order, for as long as there is life in me I will continue to refuse to believe that in this wonderful country of ours a man can not only be deprived of his day in court but also have to go to jail, and that in a civil and not a criminal case. I know not how else to say it.

(Sworn to by Morris Gotthilf on February 21, 1962.)

[fol. 38]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF THEODORE CHARNAS READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Theodore Charnas, being duly sworn, deposes and says:

I am the attorney for Sills Of Cambridge, Inc., the judgment-creditor and one of the plaintiffs herein. I make this affidavit in opposition to the "Additional Affidavit" of Morris Gotthilf.

In an opinion published in the New York Law Journal on February 2, 1962, the court decided that body execution would be granted unless Gotthilf, by February 21st, filed an affidavit which appealed to the discretion of the court. Gotthilf could have made such an appeal by baring his present financial status and future prospects and presenting a plan for payment of the judgment against him. Instead, Gotthilf's affidavit presents a clearly contrived method to evade that judgment.

The affidavit does not disclose Gotthilf's assets. It does not disclose the source of his income nor the existence of any contractual arrangements to which he is a party. Does Gotthilf own a house? A car?

[fol. 39] His affidavit does not reveal what he has done with his earnings since the entry of this judgment against him on May 24, 1961. What has he done with the more than $3,000. he has already earned this year? How high is his scale of living? It does not even claim that none of his assets have been diverted to others for concealment. It does not explain how he got the money to pay the passage for his recent trip to Israel, let alone his expenses there (he claims he was a guest of the Israeli Government).

Does Gotthilf give the Court his best offer? He does not. He offers twenty-five per cent of an uncertain income but is willing to go higher "if the court makes a suggestion".

Gotthilf, by his affidavit would place on the judgment-creditor the burden of pursuing him each month to determine what would be twenty-five per cent of his income. This could delay unto eternity the collection of the debt from this fraudulent debtor. Gotthilf's scheme would increase the cost of this litigation to the judgment-creditor.

Gotthilf is really saying to the judgment-creditor: Examine me repeatedly in supplementary proceedings. Prove, if you can, that I am not telling you the truth about my income and my assets. If I can force you to do this work, I will have made a mockery of your right to body execution.

The only way Gotthilf will pay the judgment against him is if a body execution issues. He had been warned that the judgment-creditor would insist on body execution if the judgment were not paid.

[fol. 40] Certainly Gotthilf's affidavit does not satisfy the conditions set down in the Court's opinion previously referred to. It is not complete. It is not candid. It presents no honest plan for payment of the judgment. It should not therefore appeal to the discretion of the Court and the judgment-creditor's motion for body execution should be granted.

(Sworn to by Theodore Charnas on February 23, 1962.)

[fol. 41]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SUMMONS READ IN SUPPORT OF MOTION

Plaintiff designates New York County as the place of trial.

Plaintiff resides in New York County.

Plaintiffs claim defendants are liable to arrest and imprisonment in this case.

To the above named Defendants:

You Are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, June 10, 1960.

Theodore Charnas, Attorney for Plaintiffs, Office and Post Office Address, 551 Fifth Avenue, Borough of Manhattan, New York 17, New York.

[fol. 42]

In Supreme Court of the State of New York

County of New York

Complaint Read in Support of Motion

Plaintiffs, complaining of the defendants, by Theodore Charnas, their attorney, respectfully allege:

For a First Cause of Action:

First: The plaintiff, Sills of Cambridge, Inc. (hereinafter called "Cambridge") is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Second: Upon information and belief, the defendant, Charge-It Systems, Inc. (hereinafter called the "Corporate Defendant") was and still is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York.

Third: At all times herein mentioned, the plaintiffs, Benjamin Sills and Morton Sills (hereinafter called the "Individual Plaintiffs") were the sole stockholders of Cambridge and the principal officers thereof.

Fourth: Upon information and belief the defendant, Morris Gotthilf, (hereinafter called "Gotthilf") had at all [fol. 43] times mentioned herein, sole charge of the acts hereinafter mentioned of the Corporate Defendant and had the control and management of the business of the Corporate Defendant.

Fifth: Prior to September 24, 1959, Cambridge had borrowed various sums of money from the Corporate Defendant and had assigned its Accounts Receivable to the Corporate Defendant as security for the payment of such sums.

Sixth: The Individual Plaintiffs personally guaranteed the said indebtedness of Cambridge to the Corporate Defendant.

Seventh: Prior to September 24, 1959, Cambridge ceased doing business and on the said date had among its liabilities, a liability to the Internal Revenue Service of the United States Government for withholding tax and social security tax collected by Cambridge and not remitted to the said Internal Revenue Service, which liability, pursuant to Section 6672 of the Internal Revenue Code of 1954, was assessed against the Individual Plaintiffs as responsible officers of Cambridge.

Eighth: On or about September 24, 1959, the Corporate Defendant, acting through Gotthilf, entered into an agreement with plaintiffs; a copy of such agreement is annexed hereto, marked Exhibit A and incorporated herein by reference.

Ninth: On or about September 24, 1959, the Individual Plaintiffs paid to the Corporate Defendant the sum of [fol. 44] $2,500. and delivered to the Corporate Defendant their interest bearing notes in the total face amount of $10,500. in accordance with the agreement annexed hereto as Exhibit A.

Tenth: Thereafter the Corporate Defendant acted as the agent and trustee of plaintiffs to collect the said accounts receivable and to remit monthly collections to the said Internal Revenue Service in each month.

Eleventh: Plaintifrs have duly performed all the conditions to be performed on their part pursuant to the said Exhibit A and the Individual Plaintiffs had duly paid all of the notes required to be paid by them under said agreement to the date hereof.

Twelfth: Upon information and belief, the Corporate Defendant collected from the said accounts receivable between on or about September 24th, 1959 and April 30, 1960, in each month, various sums of money as set forth in the schedule hereto attached, marked Exhibit B and made part hereof, amounting in all to the sum of $3,358.16.

Thirteenth: Upon information and belief, the Corporate Defendant, in disregard of its fiduciary obligation, has wholly refused, failed and neglected to pay to the said Internal Revenue Service all or any part of the said collections of the accounts receivable.

Fourteenth: The plaintiffs have duly demanded of the defendants that the total sum of $3,358.16, being said collections from the accounts receivable, be paid to the said Internal Revenue Service.

[fol. 45] Fifteenth: Upon information and belief, the defendants have converted to their own use the said sum of $3,358.16 collected by them from the said accounts receivable.

Sixteenth: By reason of the defendants' conversion as aforesaid, plaintiffs have been damaged in the sum of $3,358.16 to the date hereof.

For a Second Cause of Action on Behalf of the Individual Plaintiffs and Against the Defendants:

Seventeenth: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Fifteenth" hereof as though the same were fully and at length set forth herein.

Eighteenth: On or about September 24, 1959, the defendant Gotthilf, with the knowledge and consent of the Corporate Defendant and on his own behalf and on behalf of

the Corporate Defendant, falsely and fraudulently stated to the plaintiffs that the Corporate Defendant would collect the said accounts receivable of Cambridge and remit the same to the said Internal Revenue Service monthly if the Individual Plaintiffs would agree to pay to the Corporate Defendant the sum of $13,000. in installments.

Nineteenth: Defendant Gotthilf further falsely and fraudulently stated to the Individual Plaintiffs that when the said $13,000. with interest was fully paid to the Cor- [fol. 46] porate Defendant, the Corporate Defendant would give the plaintiffs a general release and turn over to the said Internal Revenue Service all of the unpaid accounts receivable of Cambridge.

Twentieth: Upon information and belief, the representations so made by the said defendant Gotthilf were false when made and were known by the defendants to be false and in truth the facts were that the defendants never intended to remit any moneys to the said Internal Revenue Service but made such representations for the purpose of wrongfully and fraudulently obtaining from the Individual Plaintiffs the sum of $13,000. plus interest, and in addition, all of the collections of the said accounts receivable.

Twenty-first: The plaintiffs believed the aforesaid representations to be true and relied upon them and the Individual Plaintiffs were thereby induced to enter into the agreement annexed hereto as Exhibit A and to pay to the Corporate Defendant the sum of $10,682.84, being the cash and notes required to be paid by the Individual Plaintiffs pursuant to such agreement to the date hereof and Cambridge was induced to permit the defendants to collect its accounts receivable.

Twenty-second: By reason of defendants' fraudulent representations as aforesaid, the Individual Plaintiffs have been damaged in the amount of $10,682.84 to the date hereof.

[fol. 47]

For a Third Cause of Action on Behalf of the Plaintiff, Cambridge, Against the Defendants:

Twenty-third: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Twenty-first" hereof as though the same were fully and at length set forth herein.

Twenty-fourth: By reason of defendants' fraudulent representations as aforesaid, the plaintiff, Cambridge, has been damaged in the amount of $28,319.28.

For a Fourth Cause of Action on Behalf of the Individual Plaintiffs, Against the Defendants:

Twenty-fifth: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Twenty-third" hereof as though the same were fully and at length set forth herein.

Twenty-sixth: Upon information and belief, heretofore and prior to and after the 24th day of September, 1959, the defendants conspired together and maliciously and wilfully entered into a scheme to defraud and deceive the plaintiffs and to deprive them of their money and property and formed the deliberate design and purpose to wrongfully and fraudulently obtain from the Individual Plaintiffs the sum of $13,000, plus interest, and in addition, all of the collections of the said accounts receivable of Cambridge.

[fol. 48] Twenty-seventh: Upon information and belief, in pursuance of the said conspiracy and scheme, the said defendants did all the acts and things herein alleged and all of such acts and things were participated in and done by all of the defendants or by one or both of them in pursuance of the said conspiracy and for the purpose of defrauding and deceiving the plaintiffs as hereinbefore alleged.

Twenty-eighth: Pursuant to the said conspiracy, the defendants caused the Corporate Defendant to send to the Individual Plaintiffs copies of letters which purported to be copies of letters sent to the Internal Revenue Service in each month between September 1959 and May 1960, copies

of which are annexed hereto, marked Exhibit C and incorporated herein by reference.

Twenty-ninth: Upon information and belief, the said letters, Exhibit C, were not in fact sent to the said Internal Revenue Service by the defendants or either of them.

Thirtieth: Upon information and belief, no part of the remittances set forth in the letters annexed hereto as Exhibit C were ever sent to the said Internal Revenue Service by the defendants or either of them.

Thirty-first: Upon information and belief, the said copies of the letters annexed hereto as Exhibit C were sent by the defendants to the Individual Plaintiffs with full knowledge of the aforesaid facts and with the intent and purpose of defrauding and deceiving the plaintiffs as hereinbefore alleged.

[fol. 49] Thirty-second: Plaintiffs became aware of the true facts on or about May 20, 1960, and thereupon demanded of the defendants that they pay to the Internal Revenue Service forthwith the amounts set forth in the letters annexed hereto as Exhibit C, being the total sum of $3,358.16. Defendants thereupon, in pursuance to said conspiracy, promised plaintiffs that they would immediately pay such amounts to the said Internal Revenue Service.

Thirty-third: Upon information and belief, the defendants have wholly refused, failed and neglected to pay the same to the said Internal Revenue Service and have not paid the same or any part thereof to the said Internal Revenue Service or to the plaintiffs to the date hereof.

Thirty-fourth: By reason of defendants' fraud and deceit as aforesaid, the Individual Plaintiffs have been damaged in the amount of $10,682.84 to the date hereof.

For a Fifth Cause of Action on Behalf of the Plaintiff, Cambridge, Against the Defendants:

Thirty-fifth: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Thirty-third" hereof as though the same were fully and at length set forth herein.

Thirty-sixth: By reason of defendants' fraud and deceit as aforesaid, the plaintiff, Cambridge, has been damaged in the amount of $28,319.28.

[fol. 50] Wherefore, the Individual Plaintiffs demand judgment against the defendants in the sum of $3,358.16 on the first cause of action; and in the sum of $10,682.84 on each of the second and fourth causes of action; and the plaintiff, Cambridge, demands judgment against the defendants in the sum of $3,358.16 on the first cause of action and in the sum of $28,319.28 on each of the third and fifth causes of action; together with interest thereon and the costs and disbursements of this action.

Dated: June 10, 1960.

Theodore Charnas, Attorney for Plaintiffs.

(Verified by Benjamin Sills—June 10, 1960—Ruth Stark.)

[fol. 51]

EXHIBIT A ANNEXED TO COMPLAINT

(Agreement of September 24, 1959)

[LETTERHEAD OF]

CHARGE-IT SYSTEMS, INC.
1472 Broadway
New York 36, N. Y.

September 24, 1959

Messrs. Morton Sills and Benjamin Sills
9 East 48th Street
New York 17, New York

Gentlemen:

Re: Sills of Cambridge, Inc.

On September 22, 1959, we have submitted to the Internal Revenue Service the settlement arrangement between ourselves. The following is a verbatim copy of the settlement

agreed to between us and submitted to the Internal Revenue Service:

"We have today arranged with Morton Sills and Benjamin Sills personally, to accept on their behalf in full payment for their indebtedness to us, under their personal guaranty, $13,000.00 payable as follows:

Cash	$2,500.00	
Their notes with interest	$10,500.00	(Payable monthly)

[fol. 52] Sills represent and warrant that these funds are not and will not be corporate funds or collections from accounts receivable.

We will continue to collect the outstanding accounts receivable and report to you such collections twice a month, and remit to you such collections once a month. After the above referred-to personal notes of $10,500.00 and 6% interest are paid in full, we will give a general release to Sills of Cambridge, Inc. and the Individuals, and we will turn over to you all of the unpaid accounts receivable that we hold as collateral.

The condition of the account as of today is:

The Corporation owes to us	$22,768.39
We hold accounts receivable as collateral to secure the above (which includes accounts of doubtful and disputed collectability)	$28,319.28

In entering into the above settlement with the Sills, or agreeing to collect from the accounts receivable and remit such collections to you, we do not waive any of our rights to the collateral we now hold, or to take any and all legal action to enforce collection against or from the accounts receivable, the above Corporation and the Sills personally, if the $10,500.00 notes and interest are not paid in full.

[fol. 53] It is understood that as long as the monthly remittances are made to you, you will hold in abeyance further action against Sills of Cambridge, Inc. and the Sills personally.

Your acceptance of and agreement to this does not waive any of your rights that you may have to the accounts receivable collateral that we now hold."

We hereby acknowledge receipt of check for $2,500.00 subject to collection, and your 10 monthly personal notes aggregating $10,500.00.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

M. H. GOTTHILF
Morris H. Gotthilf, Chairman
of Board of Directors

MHG/sg

Consented, agreed to and accepted
BENJAMIN SILLS
MORTON SILLS

[fol. 54]

EXHIBIT B ANNEXED TO COMPLAINT

(Payments Received)

September 1959	$402.58
October 1959	468.33
November 1959	537.43
December 1959	387.27
January 1960	144.72
February 1960	375.43
March 1960	324.68
April 1960	717.72
TOTAL	$3,358.16

[fol. 55]

EXHIBIT C ANNEXED TO COMPLAINT

October 8, 1959

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4754 for $402.58, covering payments received in September, from the respective customers shown in the remittance reports attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 56]

November 6, 1959

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4789 for $468.33, covering

payments received in October, from the respective customers shown in the remittance reports attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 57] December 9, 1959

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4824 for $537.43, covering payments received in November, from the respective customers shown in the remittance reports attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 58] January 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4868 for $387.27, covering payments received in December, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 59] February 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4970 for $144.72, covering payments received in January, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 60] March 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4989 for $375.43, covering payments received in February 1960, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 61] April 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #5033 for $324.68, covering payments received in March 1960, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 62] May 10, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #5060 for $717.72, covering payments received in April 1960, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 63]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AMENDED ANSWER READ IN SUPPORT OF MOTION

The defendant, Charge-It Systems, Inc., for its amended answer to the complaint herein and the defendant, Morris Gotthilf for his answer to the complaint herein, by Archibald Palmer, their attorney, respectfully allege:

1. Deny each and every allegation contained in Paragraph Fourth of the complaint herein, except admit that said Morris Gotthilf was the Chairman of the Board of Directors of the Corporate Defendant since December, 1958.

2. Deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Fifth of the complaint, except that in December, 1958 the books and records of the Corporate Defendant indicated that prior

to September 24, 1959 Sills of Cambridge, Inc. [hereinafter referred to as the Corporate Plaintiff] had borrowed various sums of money from the Corporate Defendant and had assigned its accounts receivable to the Corporate Defendant as security for the payment of such sums.

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Seventh of the complaint herein.

[fol. 64] 4. Deny each and every allegation contained in Paragraph Ninth of the complaint herein, except admit that on or about September 24, 1959 Benjamin Sills and Morton Sills [hereinafter referred to as the Individual Plaintiffs] paid to the Corporate Defendant the sum of $2,500.00 and delivered to the Corporate Defendant their interest bearing notes in the total face amount of $10,500.00.

5. Deny each and every allegation contained in Paragraphs Tenth, Thirteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-fourth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Thirty-first, Thirty-fourth and Thirty-sixth of the complaint herein.

6. Deny each and every allegation contained in Paragraph Eleventh of the complaint herein, except admit that the Individual Plaintiffs paid all the notes required to be paid by them under said agreement.

7. Deny each and every allegation contained in Paragraph Fourteenth of the complaint herein, except admit that plaintiffs have demanded of the defendants that the total sum of $3,358.16 be paid to the Internal Revenue Service.

8. Deny each and every allegation contained in Paragraph Thirty-second of the complaint herein, except admit that on or about May 20, 1960 plaintiffs demanded of the defendants that they pay to the Internal Revenue Service forthwith the sum of $3,358.16.

[fol. 65] 9. Deny each and every allegation contained in Paragraph Thirty-third of the complaint herein, except admit that defendants have not paid the same or any part thereof to the Internal Revenue Service or to the plaintiffs.

As and for a First Affirmative Defense

10. That on and prior to September 24, 1959 the plaintiffs herein were indebted to the Corporate Defendant in the sum of $22,768.39 and said plaintiffs had failed and refused to pay said sum of money to the Corporate Defendant, although duly demanded.

11. That on and prior to September 24, 1959 the Corporate Defendant held various accounts receivable of the Corporate Plaintiff totaling the sum of approximately $28,319.28 as security for the payment of the said sum of $22,768.39.

12. That on or about September 22, 1959 and prior to September 24, 1959 the Corporate Defendant submitted to the Internal Revenue Service an agreement substantially in the form as set forth within quotation marks in the agreement dated September 24, 1959, marked Exhibit A annexed to the complaint.

13. That at the time of signing said agreement dated September 24, 1959, it was understood and agreed by and between the plaintiffs and the defendants herein, that the said agreement was conditioned upon acceptance by the Internal Revenue Service of the terms and conditions of [fol. 66] the agreement submitted to the Internal Revenue Service on or about September 22, 1959.

14. That it was further understood and agreed by and between the plaintiffs and defendants herein, that in the event the Internal Revenue Service refused to accept the terms of said agreement as so submitted to it, the defendants would not be obligated to turn over to the Internal Revenue Service any monies collected from the accounts receivable held by the Corporate Defendant.

15. That subsequent to September 24, 1959, the Internal Revenue Service notified the Corporate Defendant that it refused to accept the terms of said agreement.

16. That as a consequence thereof, the Corporate Defendant did not turn over to the Internal Revenue Service the sums of money collected by it on the accounts receivable which it held as collateral security.

As and for a Second Affirmative Defense and by Way of Setoff and as and for a First Counterclaim on Behalf of the Corporate Defendant

17. Defendants repeat, reiterate and reallege each and every allegation in Paragraphs 10 and 11 herein as though the same were set forth at full length herein.

[fol. 67] 18. That on and prior to September 24, 1959, the Individual Plaintiffs with the knowledge and consent of the Corporate Plaintiff and on their own behalf and on behalf of the Corporate Plaintiff falsely and fraudulently represented to the defendants that the plaintiffs herein were insolvent and unable to pay the sum of $22,768.39 then owing by the plaintiffs to the Corporate Defendant; that the Corporate Plaintiff had ceased doing business prior to that time; that plaintiffs had no assets from which the said sum of $22,768.39 or any portion thereof could be realized, but that they could borrow the sum of $13,000.00 from friends and relatives to be paid $2,500.00 in cash and the balance in nine equal monthly installments of $1,000.00 and one installment of $1,500.00 in ten months, and that if the Corporate Defendant did not accept this offer of settlement, the plaintiffs would be compelled to file voluntary petitions in bankruptcy and that in said event, the Corporate Defendant would realize little or nothing upon its claim against the plaintiffs.

19. Upon information and belief, that the representations so made by the said plaintiffs were false when made and were known by the defendants to be false and, in truth and in fact, the plaintiffs were not insolvent and did not intend to file voluntary petitions in bankruptcy and were financially able to pay said indebtedness out of their assets, and that plaintiffs made such representations for the purpose of wrongfully and fraudulently inducing the Corporate Defendant to enter into the agreement dated September 24, 1959.

[fol. 68] 20. The defendants believed the aforesaid representations to be true and relied upon said representations and the Corporate Defendant was thereby induced to enter into the agreement dated September 24, 1959.

21. That by reason of plaintiffs' said false and fraudulent representations the agreement dated September 24, 1959 is null and void and of no force and effect and there is due and owing to the Corporate Defendant from the plaintiffs the sum of $9,768.39 representing the difference between the sum of $13,000.00 paid to the Corporate Defendant and the sum of $22,768.39 owed by plaintiffs to the Corporate Defendant, together with interest thereon.

As and for a Third Affirmative Defense and by Way of Setoff and as and for a Second Counterclaim on Behalf of the Corporate Defendant

22. That prior to September 24, 1959, the Corporate Plaintiff had assigned certain accounts receivable to the Corporate Defendant without recourse and the Corporate Defendant had advanced certain monies to the plaintiff upon such collateral.

23. That the Individual Plaintiffs had executed collateral guarantees of the monies due from the Corporate Plaintiff to the Corporate Defendant in connection with said advances upon the collateral of accounts receivable.

[fol. 69] 24. Upon information and belief, that the Corporate Plaintiff received the sum of $1,365.03 in the form of returns, allowances and collections on said accounts so assigned by it to the Corporate Defendant, which it failed to account for or turn over to the Corporate Defendant.

25. That the Corporate Defendant duly demanded of the plaintiffs herein that they account for and turn over to the Corporate Defendant said sum of $1,365.03 and that the Individual Plaintiffs pay to the Corporate Defendant said sum of money in connection with the collateral guaranty so executed by them.

26. That the plaintiffs have failed and refused to pay over to the Corporate Defendant the said sum of $1,365.03 although duly demanded.

27. Upon information and belief, that the plaintiffs have converted to their own use the said sum of $1,365.03 received by them in connection with the said accounts receivable assigned to the Corporate Defendant.

28. That by reason of the foregoing the Corporate Defendant has been damaged in the sum of $1,365.03.

Wherefore, defendants demand judgment dismissing the complaint herein and judgment on the first counterclaim in the sum of $9,768.39 with appropriate interest thereon and judgment on the second counterclaim in the sum of $1,365.03 with appropriate interest thereon, together with the costs and disbursements of this action.

Archibald Palmer, Attorney for Defendants.

[fol. 70]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

REPLY TO AMENDED ANSWER

Plaintiffs for their Reply to the affirmative defense and counterclaims alleged in the Amended Answer of defendant, Charge-It Systems, Inc. and the Answer of defendant, Morris Gotthilf, respectfully allege:

1. Deny each and every allegation contained in Paragraph "10" of the Amended Answer of defendant, Charge-It Systems, Inc. and the Answer of defendant, Morris Gotthilf (hereinafter such Amended Answer and Answer are referred to as the "Answer") herein, except admit that on and prior to September 24, 1959, plaintiff, Sills of Cambridge, Inc. (hereinafter called "Cambridge") was indebted to defendant, Charge-It Systems, Inc. (hereinafter called "Corporate Defendant") and that the amount of such indebtedness was disputed between Cambridge and the Corporate Defendant, and that the plaintiffs, Benjamin Sills and Morton Sills were contingently liable upon such debt.

2. Deny each and every allegation contained in Paragraph "11" of the Answer, except admit that on and prior to September 24, 1959, the Corporate Defendant held various account receivables of Cambridge as security.

[fol. 71] 3. Deny having knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs "12" and "15" of the Answer.

4. Deny each and every allegation contained in Paragraphs "13", "14", "16", "18", "19", "20", "21", "24", "25", "26", "27", and "28" of the Answer.

5. Deny each and every allegation contained in Paragraph "17" of the Answer, except as hereinbefore specifically admitted in this Reply.

Wherefore, Plaintiffs demand judgment dismissing the counterclaims set forth in the Answer and for the relief demanded in the Complaint.

Theodore Charnas, Attorney for Plaintiffs.

[fol. 72]

In Supreme Court of the State of New York

County of New York

Opinion by Mr. Justice Gellinoff—February 15, 1962

[N. Y. Law Journal—February 15, 1962]

Motion after judgment pursuant to section 764 of the Civil Practice Act for the issuance of a body execution against the individual defendant will be held in abeyance as indicated herein. Plaintiffs recovered a money judgment against both defendants and the judgment has been upheld on appeal to the Appellate Division. Plaintiffs are entitled to execution of judgment pursuant to section 504 of the Civil Practice Act. The judgments, having been entered on a cause of action for fraud and deceit—upon which plaintiffs could have availed themselves of the provisional remedy of arrest, pursuant to section 826(5) of the Civil Practice Act—execution against the person may now be granted thereon. Section 764 of the Civil Practice Act is constitutional. There is not a sufficient showing that plaintiffs have waived their right to a body execution by including a cause of action upon which a body execution allegedly could not have issued, or otherwise. All other points raised by defendant were, or should have been, raised and presumably were fully reviewed, on appeal. That possible defenses were lost through alleged inadvertence or alleged negligence on the part of former counsel, is a col-

lateral matter, as to which defendant may seek redress, as he may be advised. Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment. The defendant will be granted an opportunity to do so by serving and filing an additional affidavit, as above indicated, on or before Feb-
[fol. 73] ruary 21, 1962. If no such affidavit is filed, or if the affidavit when filed does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted.

In Supreme Court of the State of New York

County of New York

Opinion by Mr. Justice Gellinoff—March 14, 1962

[N. Y. Law Journal—March 14, 1962]

The defendant has not convinced the court of any meritorious ground for withholding the issuance of a body execution. Accordingly, the motion is granted. Submit order.

[fol. 74] Affidavit of No Other Opinion (omitted in printing).

[fol. 75] Stipulation Waiving Certification (omitted in printing).

[fol. 76] Clerk's Certificate to foregoing transcript (omitted in printing)

[fol. 77]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Present—Hon. Charles D. Breitel, Justice Presiding, Hon. Benjamin J. Rabin, Hon. Francis L. Valente, Hon. Samuel W. Eager, Hon. Aron Steuer, Justices.

4987

Affirmance of Order

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC., Plaintiffs-Respondents,

vs.

CHARGE-IT SYSTEMS, INC., Defendant,

and

MORRIS GOTTHILF, Defendant-Appellant.

ORDER OF AFFIRMANCE—September 20, 1962

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 26th day of March, 1962, granting plaintiffs' motion for an order directing the issuance of an execution against the person of defendant-appellant, and said appeal having been argued by Mr. O. John Rogge of counsel for the appellant, and by Mr. Hyman Jacobs of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

ENTER:

Vincent A. Massi, Clerk.

[fol. 78] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 79]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 722

BENJAMIN SILLS & ors., Respondents,

vs.

CHARGE-IT SYSTEMS, INC., Defendant,

and

MORRIS GOTTHILF, Appellant.

ORDER DISMISSING MOTION FOR LEAVE TO APPEAL—
October 25, 1962

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 80]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 745

BENJAMIN SILLS & ors., Respondents,

vs.

CHARGE-IT SYSTEMS, INC., Defendant,

and

MORRIS GOTTHILF, Appellant.

ORDER GRANTING MOTION TO DISMISS APPEAL—
November 1, 1962

A motion having heretofore been made upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 673—October Term, 1962

MORRIS GOTTHILF, Petitioner,

vs.

BENJAMIN SILLS, ET AL.

ORDER ALLOWING CERTIORARI—April 1, 1963

The petition herein for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.